IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1815

JAMES C. GARBIEL, *Pro Se*, a Class B Equity Bearing Common Stockholder in the Missouri Pacific Railroad Company, for Himself,

Plaintiff-Appellant, Pro Se,

—v.—

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants-Appellees,

MISSOURI PACIFIC RAILROAD COMPANY,

Intervening Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

(THREE-JUDGE COURT)

MOTION TO DISMISS OR TO AFFIRM BY APPELLEE MISSOURI PACIFIC RAILROAD COMPANY

LEON LEIGHTON
Attorney for Appellee
Missouri Pacific Railroad
Company
6 East 45th Street
New York, New York 10017

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
DISTRICT OF NEW JERSEY

(THREE-JUDGE COURT)

MOTION TO DISMISS OR TO AFFIRM BY APPELLEE MISSOURI PACIFIC RAILROAD COMPANY

Statement

Pursuant to Rule 16, appellee Missouri Pacific Railroad Company (MoPac) moves to dismiss the appeal herein. If such motion be denied, appellee moves to affirm the order appealed from.

The appeal is taken from an order of a three-judge District Court in the District of New Jersey, denying appellant's motion to join the Internal Revenue Service as a party plaintiff in the action (J.S. 31-32). Appellant summarizes his motion as one "to Require Joinder of the Internal Revenue Service Under Rule 19 in order that the IRS becomes enabled to collect capital Gains taxes of over $100 million on the transfer of over $615 million values in retained income and property values from the MoPac Class B equity bearing Common Stocks to the $5 Class A Preferred $100 Value MoPac Shares without having paid any Capital gains taxes to the U. S. Government I.R.S. on this $615 million" (J.S. 29).

The action had been brought by plaintiff to set aside an order of the Interstate Commerce Commission which granted authority to MoPac, pursuant to 49 U.S.C. §20a, to issue securities in accordance with a plan to recapitalize (17a). That order was affirmed by a judgment of the same three-judge District Court entered on May 6, 1976 (14a-15a). No appeal has been taken from that judgment, though the time to appeal has expired.

The opinion of the District Court affirming the Commission's order is printed at 16a-25a. The Commission's report approving the plan of recapitalization is printed in *Missouri Pacific Railroad Company—Securities,* 347 I.C.C. 377 (1973). The opinion of the District Court refers to an opinion of the three-judge Court for the Eastern District of Missouri, which similarly affirmed the Commission's order. That unreported opinion is printed at 26a-35a. The opinion of Judge Weinfeld, approving the proposed plan of recapitalization which had been agreed upon in connection with the settlement of Class B stockholders' class

action, is reported in *Levin* v. *Mississippi River Corporation,* 59 F.R.D. 353 (S.D.N.Y. 1973), affd. sub nom. *Wesson* v. *Mississippi River Corporation,* 486 F.2d 1398 (2d Cir. 1973), *cert. den.* sub nom. *Wesson* v. *Levin,* 414 U.S. 1112 (1973), reargument denied, 415 U.S. 937 (1974).

The Motion to Dismiss

The motion to dismiss is made on the ground that the order appealed from is not one "granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." 28 U.S.C. §1253. See *Goldstein* v. *Cox,* 396 U.S. 471, 474-479 (1970); *Mitchell* v. *Donovan,* 398 U.S. 427, 430-432 (1970); *Rockefeller* v. *Catholic Medical Center,* 397 U.S. 820 (1970); *Francis* v. *Chamber of Commerce of United States,* 481 F.2d 192, 194 (4th Cir. 1973).

The Motion to Affirm

Actions similar to plaintiff's were brought by Vaiani and Wesson, two other MoPac stockholders similarly situated. The three actions were consolidated in the District Court.

On August 4, 1975, Vaiani made a motion "to invite the United States Government law representatives of the Internal Revenue Service of the United States of America to represent the federal government on the 'over 615 million dollars profits that the federal government failed to collect taxes on'" (9a). Appellant appeared in support of the motion, and a full discussion occurred (9a, 12a).

At the direction of the Court, the United States Attorney sent a copy of the motion to the Internal Revenue Service, with a copy of the covering letter to appellant (1a-3a). That letter stated: "I am writing to you as the result of the suggestion made at the hearing by Chief Judge Whipple so that if the pro se plaintiffs chose to provide information to your agency, such persons can be directed to the appropriate Internal Revenue Service Officer without delay. By copy of this letter I am providing to the plaintiffs IRS Publication 733" (2a). As indicated therein, appelllant was furnished a copy of IRS Publication 733, indicating that any one who provides the Internal Revenue Service "with information that leads to the detection and punishment of anyone guilty of violating the Internal Revenue laws" may claim a reward (4a-6a).

On August 15, Regional Counsel of the Internal Revenue Service informed appellant of the receipt of the foregoing material, and advised appellant where to supply information relating to violations of internal revenue laws (7a-8a). It does not appear that appellant ever supplied such information.

On September 17, the Court entered an order denying the Vaiani motion (9a-10a). Copy of this order was served on appellant. No appeal was taken from that order.

On January 27, 1976, appellant filed the instant motion in the District Court (J.S. 27). Copy of that motion was mailed to the Director of the Internal Revenue Service in Washington (*ibid.*). On February 9, the United States Attorney wrote to the Court reviewing the history of the efforts to direct the Internal Revenue Service to become a party (11a-13a).

If the motion to dismiss be denied, the motion to affirm should be granted for three reasons, any one of which would be sufficient.

1. The District Court has no power to require the Internal Revenue Service to become a party to the action. 26 U.S.C. §7401 provides: "No civil action for the collection or recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Secretary or his delegate authorizes or sanctions the proceedings and the Attorney General or his delegate directs that the action be commenced."

2. Even if the District Court had power to make such a direction, it properly exercised its discretion not to do so. Appellant had sufficient opportunity to bring this matter to the attention of the Internal Revenue Service (12a-13a). He also had a very persuasive incentive to do this, because of the substantial reward which he could claim in the event that the Government collected the over $100 million in taxes which he claims to be due (7a-8a).

It is apparent from the foregoing that appellant has no real interest in the federal fisc. His only concern is to ask the Internal Revenue Service to try his case against another department of the federal government, the Interstate Commerce Commission. This is sought despite the fact that no merit was found by Judge Weinfeld in appellant's attack on MoPac's capitalization, or by the three-judge Courts in Missouri and New Jersey in his attacks upon the Commission's order.

3. Appellant has not demonstrated, as required by F. R. Civ. P. 19, either that, in the absence of the Internal

Revenue Service, "complete relief cannot be accorded among those already parties"; or that the Internal Revenue Service "claims an interest relating to the subject of the action and is so situated that the disposition of the action in [its] absence may (i) as a practical matter impair or impede [its] ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reasons of [its] claimed interest."

CONCLUSION

For the foregoing reasons, it is submitted that the appeal should be dismissed. If the appeal is not dismissed, the order appealed from should be affirmed.

Respectfully submitted,

LEON LEIGHTON
Attorney for Appellant
Missouri Pacific Railroad Company

APPENDIX

APPENDIX

Letter, United States Attorney to Internal Revenue Service

UNITED STATES DEPARTMENT OF JUSTICE

UNITED STATES ATTORNEY
FOR THE DISTRICT OF NEW JERSEY
NEWARK, NEW JERSEY 07101

August 7, 1975

John J. Hopkins, Esquire
Assistant Regional Counsel
Internal Revenue Service
Post Office Box 480
Newark, New Jersey 07101

Re: James C. Gabriel, pro se, et al v. United States of America, et al—Civil Action 74-469

Dear Mr. Hopkins:

Enclosed is a copy of the motion of plaintiff pro se John Charles Vaiani dated August 4, 1975 in the above-referenced matter. The three-judge Court ruled from the bench on August 6 that the motion became moot as a result of my appearance in response to the motion. Enclosed is a copy of the Order submitted to the Court.

After receiving the motion on the afternoon of August 5, on August 6 I contacted William McElroy of the Internal Revenue Service Intelligence Division in Newark and Eric Kazin, Claims Examiner of the Audit Division of the In-

ternal Revenue Service who advised me concerning the provisions of 26 U.S.C. Section 7623 and Treasury Regulation 301.7623 *et seq.*

The motion by pro se plaintiff contends that the Government "has failed to collect taxes on" the profits of the Missouri Pacific Railroad realized from the plan of recapitalization approved by the Interstate Commerce Commission. This plan is best described in *Levin* v. *Mississippi River Corporation,* 59 F.R.D. 353 (S.D.N.Y. 1973, *aff'd,* 486 F.2d 1398 (2d Cir. 1973). At the hearing before the Court on August 6, I informed the Court that the pro se plaintiffs had a viable remedy under Section 7623 instead of moving the Court to invite the Internal Revenue Service to represent the Government. In short, that remedy, as I understand it, is for the plaintiffs to reveal information to the Internal Revenue Service so that your agency may determine whether additional taxes may be due and owing from the Missouri Pacific Railroad and whether any revenue laws have been violated. Any plaintiffs providing such information, such as Mr. Vaiani, could then file a claim under Section 7623 for a reward as an informer.

I am writing to you as the result of the suggestion made at the hearing by Chief Judge Whipple so that if the pro se plaintiffs chose to provide information to your agency, such persons can be directed to the appropriate Internal Revenue Service officer without delay. By copy of this letter I am providing to the plaintiffs IRS Publication 733.

If this office can be of any further assistance, please do not hesitate to contact me.

Very truly yours,

JONATHAN L. GOLDSTEIN
United States Attorney

/s/ RONALD L. REISNER

By: Ronald L. Reisner
Assistant United States Attorney

Enclosures

cc—Hon. James Hunter, III, Circuit Judge
Hon. Lawrence A. Whipple, Chief Judge
Hon. Clarkson S. Fisher, District Judge
Mr. James C. Gabriel—C.M. R.R.R.
Mr. John Charles Vaiani—C.M. R.R.R.
Mr. William R. Wesson—C.M. R.R.R.
Leon Leighton, Esquire

IRS Publication 733

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE

INFORMATION ABOUT REWARDS FOR INFORMATION GIVEN TO THE INTERNAL REVENUE SERVICE

Provisions of Law

Section 7623 of the Internal Revenue Code permits the Internal Revenue Service to pay a reward to anyone who provides it with information that leads to the detection and punishment of anyone guilty of violating the Internal Revenue laws.

Who May File A Claim For Reward

Under the above provisions, you may file a claim for reward unless:

1. You were employed by the Department of the Treasury at the time you received or submitted the information; or
2. You are a present or former Federal employee, who received the information in the course of your official duties.

An executor, administrator, or other legal representative may file a claim for reward on behalf of a decedent if that decedent was eligible to file such a claim before his death. The legal representative must attach to his claim evidence of his authority to file it.

IRS Publication 733

Submitting Information For A Reward

If you have information you believe might be valuable to the Internal Revenue Service, you may submit it in person or writing to the Office of the Director, Intelligence Division, Internal Revenue Building, Washington, D.C. 20224; or to a representative of the Intelligence Division, office of any District Director.

Filing A Claim For Reward

To file a claim for reward, take the following steps when, or as soon as possible after, you submit the information:

1. Notify the office or person to whom you reported the information that you are claiming a reward.
2. File a formal claim for reward by completing Form 211, signing it with your true name, and mailing it to an Informants Claim Examiner at the office of any District Director of Internal Revenue; or to the Director, Intelligence Division, Washington, D.C. 20224. If you submitted the information in person, include in your claim the name and title of the person you reported the information to, and the date you reported it.

If you used an identity other than your true name when you originally reported the information, attach to the claim proof that you are the person who gave the information. (The Service does not disclose the identity of its informants to unauthorized persons.)

IRS Publication 733

Amount And Payment Of Reward

The District Director will determine whether a reward will be paid to you, and its amount. In making his decision he will evaluate the information you provided, in relation to the facts developed by the resulting investigation. A reward usually will not exceed 10 percent of the additional taxes, penalties, and fines found to be due. Any reward will be paid as soon as possible after collection of these additional amounts.

Publication 733 (1-74)

Letter, Internal Revenue Service to Appellant

Department of the Treasury
REGIONAL COUNSEL
INTERNAL REVENUE SERVICE
Mid-Atlantic Region
P.O. Box 480
Newark, New Jersey
07101

Aug. 15, 1975

Mr. James C. Gabriel
R.D. #1, Box 16
Colts Neck, New Jersey 07722

In re: James C. Gabriel, pro se, et al v.
United States of America, et al—
Civil Action 74-469

Dear Mr. Gabriel:

The United States Attorney has advised this office by letter of August 7, 1975, copy sent to you, that at a Federal Court hearing on August 6, 1975, Chief Judge Whipple suggested that if the pro se plaintiffs in the captioned action chose to provide information to the Internal Revenue Service concerning the incurrence of tax liability by the Missouri Pacific Railroad, and the violation of Internal Revenue laws, they should be directed to the appropriate division of the Internal Revenue Service.

Please be advised that information relating to violations of Internal Revenue laws should be directed to the Chief, Intelligence Division, 970 Broad Street, Newark, New Jer-

Letter, IRS to Appellant

sey 07102; and information relating to the incurrence of additional tax liability should be directed to the Chief, Audit Division, 970 Broad Street, Newark, New Jersey.

Very truly yours,

ROBERT L. LIKEN
Regional Counsel

By: /s/ JOHN J. HOPKINS
John J. Hopkins
Assistant Regional Counsel

cc: Chief, Intelligence Division t/w ltr dated 8/7/75
Chief, Audit Division t/w ltr dated 8/7/75
Assistant United States Attorney Ronald Reisner

Order Dated September 17, 1975

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action 74-469

JAMES C. GABRIEL, *pro se, et al.*,
Plaintiffs,

—v.—

UNITED STATES OF AMERICA, *et al.*,
Defendants.

This matter, a motion dated August 4, 1975 and received by the Office of the United States Attorney for the District of New Jersey on August 5, 1975 to invite the United States Government law representatives of the Internal Revenue Service of the United States of America to represent the federal government on the "over 615 million dollar profits that the federal government failed to collect taxes on," having been opened to the Court by John Charles Vaiani, plaintiff pro se, in the presence of Jonathan L. Goldstein, United States Attorney for the District of New Jersey, Ronald L. Reisner, Assistant United States Attorney appearing, Fritz R. Kahn, General Counsel for the Interstate Commerce Commission, Hanford O'Hara, Esquire appearing, Leon Leighton, Esquire appearing, James C. Gabriel, plaintiff pro se appearing, and William R. Wesson, plaintiff pro se appearing, the Court having considered the notice of motion, the affidavit of John Charles Vaiani in support of

Order Dated September 17, 1975

the motion, the oral argument of pro se plaintiff and counsel and the Court having determined that the motion is moot since a United States Government law representative of the Internal Revenue Service of the United States of America, namely, Assistant United States Attorney Ronald L. Reisner appeared before this Court on August 6, 1975, and for good cause shown;

It is on this 17th day of September, 1975

ORDERED that the motion dated August 4, 1975 herein be and the same hereby is denied without costs.

/s/ JAMES HUNTER
JAMES HUNTER, III
United States Circuit Judge

LAWRENCE A. WHIPPLE*
Chief, United States District Judge

/s/ CLARKSON S. FISHER
CLARKSON S. FISHER
United States District Judge

ORIGINAL FILED
Sept. 18, 1975

ANGELO W. LOCASCIO, *Clerk*

* Judge Whipple concurs in this decision but because of illness was unable to sign the order.

Letter, United States Attorney to United States District Court

UNITED STATES DEPARTMENT OF JUSTICE

UNITED STATES ATTORNEY
FOR THE DISTRICT OF NEW JERSEY
Newark, New Jersey 07101

February 9, 1976

Honorable James Hunter, III
Circuit Judge
401 Market Street
Camden, New Jersey 08101

Honorable Lawrence A. Whipple
Chief Judge
United States District Court
Federal Building
Newark, New Jersey 07101

Honorable Clarkson S. Fisher
United States District Judge
Federal Building
Trenton, New Jersey 08607

Re: James C. Gabriel, pro se, et al v. U. S., et al
Civil Action 74-469

Dear Members of the Court:

On January 30, 1976 this office was served by plaintiff Wesson with a notice of motion with no return date as re-

quired by Rule 12C of this Court. The notice and supporting affidavit concern plaintiff's request to require joinder of the "Internal Revenue Service" as a party defendant under F.R.Civ.P. 19. A similar notice of motion was received on February 5, 1976 from plaintiff Gabriel.

First, the relief which plaintiffs Wesson and Gabriel seek has already been accomplished since the sovereign United States of America has already been properly joined as a defendant. The law is well-established that the agencies of the United States cannot be sued *eo nomine* in the absence of any statutory authority. *Blackmar* v. *Guerre,* 342 U.S. 512 (1952); *Krouse* v. *United States Government,* 380 F.Supp. 219, 221 (C.D. Cal. 1974). The only proper party defendant could be the United States of America, not its agency, the Internal Revenue Service. *Krouse, supra* at 221. Since the United States has already been joined, the motion should be denied as moot.

Second, plaintiffs' motions are essentially the same requests for relief raised by plaintiff Vaiani at the trial of this consolidated case on August 6, 1975. A full discussion occurred (see Transcript at 77-84) and plaintiff Vaiani's "motion" was denied by order of this Court on September 18, 1975. Having litigated this very same claim at trial, there is no need to re-litigate the same issue with respect to the remaining plaintiffs in this consolidated action.

Finally, plaintiffs have had ample opportunity to provide any information to the responsible officials in the IRS. In response to Chief Judge Whipple's suggestion at trial, this

office notified by letter the Regional Counsel of IRS on August 7, 1975. Copies of that letter were provided to all counsel, Members of this Court, and all plaintiffs as evidenced by the return certified mail receipts which were returned to this office. In response to that letter, on August 14, 1975, the Regional Counsel's office by letter notified the plaintiffs of the proper procedure. Copies of those letters dated August 14, 1975 are enclosed.

Accordingly, under all of these circumstances, the motions from plaintiffs Wesson and Gabriel to require joinder of the Internal Revenue Service under Rule 19 should be denied. The motion can, perhaps, be decided pursuant to F.R.Civ.P. 78 and this letter memorandum considered in lieu of a formal brief.

Respectfully,

JONATHAN L. GOLDSTEIN
United States Attorney
By: RONALD L. REISNER
Assistant United States Attorney

Enclosures

cc—Mr. James C. Gabriel—CMRRR w/copy Letrs.
Mr. John Charles Vaiani—CMRRR "
Mr. William R. Wesson—CMRRR "
Leon Leighton, Esquire "

Judgment of District Court

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Consolidated Civil Actions
74-471, 74-470, 74-469

JAMES C. GABRIEL, *Pro Se,* JOHN CHARLES VAIANI, *Pro Se,* WILLIAM R. WESSON, *Pro Se,*

Plaintiffs,

—v.—

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants,

—and—

MISSOURI PACIFIC RAILROAD COMPANY,

Defendant-Intervenor.

This matter, having been opened to the Court by James C. Gabriel, John Charles Vaiani and William R. Wesson, plaintiffs pro se, in the presence of Jonathan L. Goldstein, United States Attorney for the District of New Jersey, Ronald L. Reisner, Assistant United States Attorney appearing, Thomas E. Kauper, Assistant Attorney General of the United States, John H. D. Wigger, Esquire, appear-

ing, Fritz R. Kahn, General Counsel for the Interstate Commerce Commission, Hanford O'Hara, Esquire appearing, Milton Rosenkranz, Esquire and Leon Leighton, Esquire appearing, and the Court having considered all of the documents filed as well as the briefs and oral argument of counsel and the Court having filed an opinion on April 20, 1976 and for good cause shown;

It is on this 4th day of May, 1976

ORDERED and ADJUDGED that final order of the Interstate Commerce Commission questioned herein be and the same hereby is AFFIRMED without costs.

/s/ JAMES HUNTER
JAMES HUNTER, III
United States Circuit Judge

/s/ LAWRENCE A. WHIPPLE
Chief, United States District Judge

/s/ CLARKSON S. FISHER
CLARKSON S. FISHER
United States District Judge

ORIGINAL FILED
MAY 6 1976

ANGELO W. LOCASCIO, *Clerk*

Opinion of New Jersey District Court

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

NOT FOR PUBLICATION

Consolidated Civil Actions
74-471, 74-470, 74-469

JAMES C. GABRIEL, *Pro Se,*
JOHN CHARLES VAIANI, *Pro Se,*
WILLIAM R. WESSON, *Pro Se,*

Plaintiffs,

—v.—

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Defendants,

—and—

MISSOURI PACIFIC RAILROAD COMPANY,

Defendant-Intervenor.

APPEARANCES:

JAMES C. GABRIEL, *Pro Se*
JOHN CHARLES VAIANI, *Pro Se*
WILLIAM R. WESSON, *Pro Se*

THOMAS E. KAUPER, Esq.,
Asst. Attorney General,

By: JOHN H. D. WIGGER, Esq.,
—and—
JONATHAN L. GOLDSTEIN, Esq.,
United States Attorney,

By: RONALD L. REISNER, Esq.,
For the United States of America

FRITZ R. KAHN, Esq.,
General Counsel,

By: HANFORD O'HARA, Esq.,
For Interstate Commerce Commission

MILTON ROSENKRANZ, Esq.,
LEON LEIGHTON, Esq.,
For the Defendant-Intervenor

Before:

HUNTER, *Circuit Judge,*
WHIPPLE and FISHER, *District Judges.*

FISHER, District Judge

Plaintiffs, three disappointed preferred stockholders of the Missouri-Pacific Railroad Company (hereinafter MoPac), brought this action to set aside and annul an order of the Interstate Commerce Commission which granted authority to MoPac under the Interstate Commerce Act, 49 U.S.C. 20a to issue securities in accordance with a plan submitted to the I.C.C. to recapitalize. Plain-

tiffs and others had opposed the plan before the I.C.C. Jurisdiction is conferred by virtue of §§1336(a), 1398(a), 2284, 2321-2325, 2401 of Title 28 U.S.C. and §1009 of Title 5. The purpose of the suit is to have this court set aside the determination of the I.C.C.

The terms of the plan of recapitalization have previously been settled and approved and reported in a comprehensive opinion and judgment by Judge Weinfeld in a class action brought by Class B stockholders of MoPac, to which class plaintiffs here belong. *Levin* v. *Mississippi River Corp.*, 59 F.R.D. 353 (S.D.N.Y. 1973), aff'd sub nom. *Wesson* v. *Mississippi River Corp.*, 486 F.2d 1398 (2d Cir. 1973), *cert. denied* 414 U.S. 1112 (1973).

Upon reorganization in 1956 under Section 77 of the Bankruptcy Act (11 U.S.C. §205), MoPac, a Missouri corporation, was authorized to issue two classes of stock: Class A (issued to former preferred stockholders) and Class B (issued to former common stockholders). Class A stockholders had certain preferences as to the payment of dividends and in the event of dissolution of the company. Each share of both types had one vote: 1.9 million shares (98%) were held by Class A stockholders, and 40,000 shares (2%) were held by Class B stockholders. Class A holders thus had operational control over the corporation, but on mergers, consolidations or reorganizations involving issuance of additional stock or the alteration of rights of the respective Classes, a majority of each Class was required to approve the action proposed. This situation caused a conflict between the two Classes, a conflict aggravated by the fact that Mississippi River Corporation (Mississippi),

had by 1963 acquired a majority of the Class A shares, while Alleghany Corporation (Alleghany) held a majority of the Class B shares.

In December of 1967 a class and derivative action was commenced on behalf of all Class B stockholders (Alleghany and others) against MoPac, Mississippi, and three directors of MoPac, to compel the payment of higher dividends, past and future. In that action, *Levin* v. *Mississippi River Corp.*, 59 F.R.D. 353 (S.D.N.Y. 1973), *aff'd mem.* 486 F.2d 1398 (2d Cir. 1973), *cert. denied* 414 U.S. 1112, 38 L.Ed.2d 739, *reh. denied* 415 U.S. 939, it was also alleged that certain defendants had engaged in a conspiracy to "freeze out" Class B stockholders in various ways (improperly limiting dividends etc.) and that such acts were also in violation of the Securities Exchange Act and rules thereunder. Plaintiffs sought various types of relief from the Court, including an order compelling payment of higher past and future dividends.

After extensive discovery was undertaken by the parties in the succeeding months and years, during which time efforts at settlement were also pursued, a settlement was finally reached and presented to the court,[1] on the basis of

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[1] The terms of the proposed settlement were described by the court as follows (59 F.R.D. at 360-361):

> (1) each share of Class A stock would be converted into one share of $5 cumulative preferred stock, with a liquidating preference of $100 per share, convertible into one share of new common after one year following I.C.C. authorization of the issuance of new securities and redeemable at the option of MoPac for $100 per share, after December 31, 1975. This would require the issuance of 1,864,052 shares of the new stock to the present holders of the Class A stock, of which Mississippi would be entitled to receive 1,158,395 shares;

a restructured capitalization which would, if consummated, eliminate the controversy between Class A and Class B shareholders. In March 1973, the district court approved the settlement (59 F.R.D. at 373) and its decision was upheld on appeal (486 F.2d 1398), and certiorari was denied.

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(2) each share of Class B stock would be converted into sixteen shares of new common stock and $850 cash. This would require the issuance of 635,696 shares of new common stock to the present holders of Class B stock, of which Alleghany would be entitled to receive 339,888 shares; this would require a cash payment by MoPac of $33,771,350;

(3) both preferred stock and common stock would have one vote per share;

(4) the Plan and amendment would have to be approved by 75% of the outstanding shares of each class of MoPac stock, including a majority of the shares of each class other than those held by Mississippi and Alleghany—that is, a majority of the minority stockholders of each class;

(5) the issuance of the new shares would have to be approved by the Interstate Commerce Commission;

(6) upon such approvals, Mississippi is required to make a cash tender offer to all Class B stockholders for at least 400,000 shares (approximately 63%) of the new common stock, at $100 per share, and Alleghany (but not the minority B shareholders) must tender all its new common stock (339,888 shares). If more than 400,000 shares are tendered, Mississippi may purchase the shares on a pro rata basis; this would require a cash payment by Mississippi of at least $40,000,000;

(7) all claims asserted in this action and any other claims against the defendants which are based upon or arise from any of the matters alleged in the complaints, regardless of the legal theory upon which they are based, will be dismissed with prejudice;

(8) fees awarded to plaintiffs' attorneys will be paid by MoPac and Mississippi.

If the recapitalization and tender offer are not consummated by December 31, 1973, the settlement agreement would be terminable at the option of Alleghany, Mississippi or MoPac.

Under the proposed settlement, which the court approved, a majority of the minority Class B stockholders could reject the plan (59 F.R.D. at 374). Pursuant to the proposed settlement, and promptly following the court's decision, MoPac, in April 1973, filed its application with the Commission under Section 20a of the Interstate Commerce Act, 49 U.S.C. §20a, for authority to issue the various stocks called for in the recapitalization plan. After notice of the application was given to all MoPac stockholders, hearings were held, at which plaintiffs herein and others expressed their opposition to MoPac's application.

At a special meeting of MoPac stockholders, held on June 15, 1973, 86.5% of the outstanding shares of Class A stock were voted in favor of the recapitalization plan and 83.4% of the outstanding shares of Class B stock were voted in favor of the recapitalization plan. Among the minority shares in both classes (i.e. those shares not owned by either Mississippi or Alleghany), 95.5% of Class A shares present and voting were voted in favor of the plan and 84.7% of the Class B shares present and voting were voted in favor of the recapitalization plan.

On December 14, 1973 Division 3, consisting of three Commissioners, issued its report and order granting MoPac's application. The order was made effective immediately, as time was of the essence in view of the deadline set forth in the settlement agreement. On December 28, 1973 the Commission issued an order denying petitions of plaintiffs and others to stay the effective date of the December 14, 1973 order. On January 23, 1974 the Commission issued its order denying petitions for reconsideration

of the December 14 order and on March 4, 1974, the Commission issued an order denying petitions seeking a finding that an issue of general transportation importance was involved. On January 21, 1974 the MoPac plan of recapitalization was consummated. The instant actions were commenced on April 4, 1974 while the companion case in the Eastern District of Missouri, *Labelle Gillespie* v. *United States, et al.,* Civil Action No. 74-239 C(2) was commenced on April 2, 1974. The Three-Judge Court which was convened in *Labelle Gillespie* v. *United States, et al., supra,* stated in their opinion:

> "The amendment to MoPac's Articles of Association was made in conformity to Missouri law. MoPac's Articles of Association expressly provide that the rights of all holders of capital stock of the company are subject to change, alteration, abrogation, or repeal in any matter permitted by the laws of Missouri. And Section 388.220, R.S. Mo., specifically authorizes modifications of the stock structure of railroad companies such as were here made. Hence, since far more than the requisite number of shareholders of each class of stock has voted in favor of the changes, the question before the Interstate Commerce Commission on the Section 20a application was a very narrow one of whether the issuance of the new securities to effectuate the plan and amendment to the Articles of Association would be 'for some lawful object within [MoPac's] corporate purposes and compatible with the public interest', and would be 'reasonably necessary and appropriate for such purpose'."

This court's function is limited. The decisions of independent regulatory agencies are generally sustained if within the authority of the agency's statutory power and are based upon appropriate findings which are in turn supported by substantial evidence. *Consolo* v. *Federal Maritime Comm'n.,* 383 U.S. 607, 619-621 (1966); *United States* v. *Pierce Auto Freight Lines,* 327 U.S. 515, 535 (1945). This standard applies in cases involving Commission decisions under §20a of the Act. *Chicago S.S. and S.B.R.R.* v. *United States,* 221 F.Supp. 106, 109 (N.D.Ind. 1963). "The test of judicial review for an order of the Commission is whether the action of the Commission is supported by 'substantial evidence' on the record reviewed as a whole." *Metropolitan Shipping Agents of Illinois, Inc.* v. *Interstate Commerce Commission,* 342 F.Supp. 1266, 1268 (D.N.J. 1972).

The Commission's review in the MoPac recapitalization was limited under Section 20a(2) of the Act to a determination of whether the issuance of securities in connection with the plan would be "• • • for some lawful object within [the carrier's] corporate purposes, and compatible with the public interest . . ." and ". . . is reasonably necessary and appropriate for such purpose".

The Commission, in an exhaustive report, found that the recapitalization was the result of extensive arms-length bargaining by MoPac, Mississippi and Alleghany and was analysed by independent financial and investment advisers specializing in corporation and transportation finance. The I.C.C. further noted that the settlement was approved by the court in the *Levin* case, after due consideration being given to the rights and possible remedies of each class of

stockholders. The plan of recapitalization had been approved by a majority of each class of stockholders and by a majority of the minority stockholders of each class. The Commission further found that the allocation of new shares (1 new preferred share for 1 share of old Class A stock, and 16 shares of new common for 1 share of old Class B plus a cash sum) is reasonable and fair in view of the present and prospective worth of MoPac. The I.C.C. summarized in their report (p. 59) as follows:

> "In our opinion, the proposed plan is not contrary to the public interest. In fact, considering the benefits to each class of stock and the advantages to the carrier, it is our conclusion that the plan of recapitalization will be in the best interest of the stockholders and the carrier and will be compatible with the public interest."

The benefits of the recapitalization plan to MoPac include the elimination of the old class voting system and the dividend conflict which caused considerable dissension in the past and the fact that the Mississippi River Corporation would own a majority of both preferred and common stocks, thereby eliminating the old Class B veto power. As a result, MoPac will have greater management flexibility and stability and MoPac will be in a better position to consider and be considered for mergers and consolidations in the future.

As to the main contention of the plaintiffs asserting that they were unlawfully deprived of the value of their old Class B stock on the theory that the "book value" of

the Class B stock was almost $9,000 a share, the I.C.C. pointed out that book value cannot be the measure of fair value of stock; rather, earnings must be considered and the capitalized earnings method is the proper means of analysis. See, *Schwabacher* v. *United States,* 334 U.S. 182 (1948); *Boston & M.R. Securities Modification,* 275 I.C.C. 397, 431-33 (1950); *Levin* v. *Mississippi River Corp., supra,* at 369.

As to the other contentions of the plaintiff, they do not merit extensive comment since the Commission's findings on these issues were also warranted.[2]

We do not find any reason to differ with those findings. Our sole function is to determine whether the decision of the Commission is consistent with the public interest and lawful. We agree that it is and affirm those findings and decision.

Therefore, the order of the Commission questioned herein should be and is hereby affirmed.

Submit an Order.

Dated: April 20, 1976

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[2] As the court stated in *Labelle Gillespie* v. *United States et al.,* Civil Action No. 74-239 C(2):

> "Other contentions of plaintiff, rejected by the Commission, included (1) that an 'immutable contract was created by the 1956 plan of reorganization could not be altered over the dissent of a single Class B shareholder; (2) that the settlement plan approved by Judge Weinfeld has a 'congenital defect' in that the *Levin* suit for dividends was 'illegally' converted into a suit for recapitalization; (3) that the settlement plan was forced upon the Class B shareholders by 'court fiat'; (4) that the proxy statement for the stockholders' meeting was false and misleading; and (5) that MoPac, Mississippi and their respective Boards' Directors were guilty of conspiracy, fraud and deceit.
>
> We agree that the Commission's findings on these issues were warranted. So, too, we find no merit to plaintiffs further assertion that Alleghany 'sold out' the other Class B stockholders by entering into the settlement agreement."

Opinion of Missouri District Court

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

No. 74-239-C (2)

LABELLE GILLESPIE,

Plaintiff,

—VS.—

UNITED STATES OF AMERICA, and
INTERSTATE COMMERCE COMMISSION,

Defendants,

MISSOURI PACIFIC RAILROAD COMPANY,

Intervenor-Defendant.

Before WEBSTER, *Circuit Judge,* WANGELIN and REGAN, *District Judges.*

REGAN, *Judge*

By this action heard to a three-judge court, plaintiff seeks to set aside and annul orders of the Interstate Commerce Commission under Section 20a of the Interstate Commerce Act granting authority to the Missouri Pacific Rail-

road Company (MoPac) to issue securities in connection with a plan of recapitalization. Plaintiff is one of several MoPac stockholders who opposed the plan both before the Commission and previously. We have jurisdiction under Sections 1336(a), 1398(a), 2284 and 2321-2325, 28 U.S.C.

The background of this controversy is set forth in detail both in the comprehensive 71 page report of the Commission and in Judge Weinfeld's opinion in *Levin* v. *Mississippi River Corporation,* D. C. N.Y., 59 FRD 353. We briefly summarize.

MoPac is a Missouri corporation which was reorganized in 1956 under Section 77 of the Bankruptcy Act (Section 205, 11 U.S.C.). Upon reorganization, MoPac was authorized to issue two classes of $100 stated capital no par stock: Class A which was issued to former preferred stockholders and Class B issued to former common stockholders. Class A stock was preferentially entitled to non-cumulative dividends of not to exceed $5 per share annually. Each share of both classes was entitled to one vote. Class A stock, which constituted 98 per cent of the total stock, had operational control over the corporation (e.g., power to elect the Board of Directors), but in certain other important areas such as mergers, consolidations and reorganizations involving the issuance of additional stock or the alteration of rights of either class of stock, the separate consent of a majority of both classes was required, thus giving a majority of the numerically small number of Class B shares veto power over such matters. See *Levin* v. *Mississippi River Fuel Corp.,* 386 U.S. 162.

By 1963, Mississippi River Corporation (Mississippi) had acquired a majority of the Class A shares while Alleghany

Corporation (Alleghany) had become the owner of a majority of the Class B shares. Thus, since 1963, Mississippi has elected MoPac's Board of Directors and Alleghany exercised a veto power independent of the other Class B shareholders as to any corporate action necessitating Class B shareholder approval.

Understandably, because of MoPac's increased earnings and other factors, Class B shareholders, led by Alleghany, had become dissatisfied, to say the least, with MoPac's dividend policy of paying only $5 per share annually on Class B stock. As a result, a class and derivative action (*Levin* v. *Mississippi River Corporation, supra*) was instituted in which it was alleged, inter alia, that the defendants were parties to a conspiracy to "freeze out" Class B stockholders by various methods including the payment of unreasonably low dividends, that Mississippi had misused its majority voting power, and that defendants had breached their fiduciary duties. The major relief sought was an order compelling the payment of higher past and future dividends. The director defendants in that suit asserted that their dividend policy was justified by prudent business judgment made in good faith.

Thereafter, commencing in 1968 and continuing until the latter part of 1972, the parties to the *Levin* litigation (including Alleghany, two other minority B stockholders, Mississippi and MoPac) undertook extensive and thorough pretrial discovery, following which a settlement was agreed upon on the basis of a restructured capitalization which would, if consummated, eliminate the underlying cause of the constant stress between Class A and Class B shareholders.

On March 19, 1973, in an exhaustive opinion, Judge Weinfeld approved the proposed settlement as fair and reasonable, noting that "it offered a permanent solution to the long-standing impasse between the two contending groups of stockholders." 59 FRD at 373. The District Court decision was affirmed without opinion on appeal by the Second Circuit, 486 F.2d 1398, and certiorari was denied.

As summarized by Judge Weinfeld, the settlement provided for a Plan of Recapitalization and a proposed Amendment to MoPac's Articles of Association subject to its stockholders' approval to bring about the following:

> "(1) [E]ach share of Class A stock would be converted into one share of $5 cumulative preferred stock, with a liquidating preference of $100 per share, convertible into one share of new common after one year following ICC authorization of the issuance of new securities and redeemable at the option of MoPac for $100 per share, after December 31, 1975. This would require the issuance of 1,864,052 shares of the new stock to the present holders of the Class A stock, of which Mississippi would be entitled to receive 1,158,395 shares;
>
> (2) each share of Class B stock would be converted into sixteen shares of new common stock and $850 cash. This would require the issuance of 635,696 shares of new common stock to the present holders of Class B stock, of which Alleghany would be entitled to receive 339,888 shares; this would require a cash payment by MoPac of $33,771,350;
>
> (3) both preferred stock and common stock would have one vote per share;

(4) the Plan and amendment would have to be approved by 75% of the outstanding shares of each class of MoPac stock, including a majority of the shares of each class other than those held by Mississippi and Alleghany—that is, a majority of the minority stockholders of each class;

(5) the issuance of the new shares would have to be approved by the Interstate Commerce Commission;

(6) upon such approvals, Mississippi is required to make a cash tender offer to all Class B stockholders for at least 400,000 shares (approximately 63%) of the new common stock, at $100 per share, and Alleghany (but not the minority B shareholders) must tender all its new common stock (339,888 shares). If more than 400,000 shares are tendered, Mississippi may purchase the shares on a pro rata basis; this would require a cash payment by Mississippi of at least $40,000,000;

(7) all claims asserted in this action and any other claims against the defendants which are based upon or arise from any of the matters alleged in the complaints, regardless of the legal theory upon which they are based, will be dismissed with prejudice;

(8) fees awarded to plaintiffs' attorneys will be paid by MoPac and Mississippi.

If the recapitalization and tender offer are not consummated by December 31, 1973, the settlement agreement would be terminable at the option of Alleghany, Mississippi or MoPac."

Thus, in addition to the required approval of the Interstate Commerce Commission for the issuance of the new shares, the recapitalization plan could not have been effected without the consent of 75 per cent of the outstanding stock of each class including a majority of the shares of each such class held by others than Mississippi and Alleghany. Substantially more than the necessary number of shares having voted in favor of the recapitalization plan, the issue before the Interstate Commerce Commission was whether it should grant its approval under Section 20a to issue the securities called for in the plan of recapitalization.

After a hearing at which all parties were accorded the right to present evidence and arguments, the Commission issued its report and order on December 14, 1973, granting MoPac's application, the order being made effective immediately in view of the deadline set forth in the settlement agreement. On December 28, 1973, the Commission denied petitions to stay the effective date of its December 14, 1973 order, and on January 23, 1974, it denied petitions for reconsideration of that order. On March 4, 1974, the Commission denied petitions seeking a finding that an issue of general transportation importance is involved. The plan of recapitalization was consummated on January 21, 1974, and this suit followed on April 2, 1974.

The amendment to MoPac's Articles of Association was made in conformity to Missouri law. MoPac's Articles of Association expressly provide that the rights of all holders of capital stock of the company are subject to change, alteration, abrogation, or repeal in any manner permitted

by the laws of Missouri. And Section 388.220, R.S.Mo., specifically authorizes modifications of the stock structure of railroad companies such as were here made. Hence, since far more than the requisite number of shareholders of each class of stock has voted in favor of the changes, the question before the Interstate Commerce Commission on the Section 20a application was the very narrow one of whether the issuance of the new securities to effectuate the plan and amendment to the Articles of Association would be "for some lawful object within [MoPac's] corporate purposes and compatible with the public interest," and would be "reasonably necessary and appropriate for such purpose."

The Commission recognized that the rights of minority stockholders are a part of the public interest, so that in determining whether the transaction was "compatible with the public interest," it was required "to see that the interests of minority stockholders are protected and that the overall proposal is just and reasonable as to those stockholders."

In reaching its conclusion that the proposed plan was in the best interest of the stockholders and the carrier and was compatible with the public interest, the Commission considered the fact that the recapitalization plan had been agreed upon after extensive arms-length bargaining between MoPac, Mississippi, and Alleghany, and approved by the court in the *Levin* case, the value per share of the Class A and Class B stock, the consideration to be paid for each share of existing stock, the evidence of the parties at the hearing, and the arguments and contentions in their briefs. In addition, consideration was given to the fact that the

elimination of the veto power held by the Class B stock would have the effect of simplifying the structure of MoPac stock and that the conversion feature of the new stock might result in an all-common stock structure. It was the opinion of the Commission that the proposed plan would provide an effective means for the payment of higher dividends, would render equity financing more feasible, would more equitably distribute the voting power among the stockholders, would eliminate the confusion between Class A and B stockholders and would thereby enable MoPac to more effectively plan a more efficient and economical transportation system, including mergers with other railroads.

The principal contention of plaintiff and other minority Class B stockholders to the effect that the recapitalization plan unlawfully deprived them of a substantial portion of the full value of their Class B stock. In large part, the protestants, including plaintiff, argued that the Class B stock, at the minimum, should have been valued at "book value" ($9000 per share) if not at a higher up-dated valuation in excess of that figure.

The claim was considered at length by the Commission in light of the pertinent evidence. In rejecting "book value" as the measure of the actual value of the Class B stock, the Commission held that bookkeeping entries evidencing "book value" are of little significance in measuring the actual value of a going company such as MoPac. Instead, based on the testimony of expert witnesses, the Commission utilized the capitalized earnings method, as the result of which it held that the Class B shareholders would in fact receive "value for value." See in this connection the en-

lightening discussion in *Levin* v. *Mississippi River Corporation,* supra, 59 FRD 1c 369ff; *Schwabacher* v. *United States,* 334 U.S. 182; and *Borg* v. *International Silver Company,* 2 Cir., 11 F.2d 147, 152.

Other contentions of plaintiff, rejected by the Commission, included: (1) that an "immutable" contract was created by the 1956 plan of reorganization which could not be altered over the dissent of a single Class B shareholder; (2) that the settlement plan approved by Judge Weinfeld has a "congenital defect" in that the *Levin* suit for dividends was "illegally" converted into a suit for recapitalization; (3) that the settlement plan was "forced" upon the Class B shareholders by "court fiat;" (4) that the proxy statement for the stockholders' meeting was false and misleading; and (5) that MoPac, Mississippi, and their respective boards' directors were guilty of conspiracy, fraud and deceit.

We agree that the Commission's findings on these issues were warranted. So, too, we find no merit to plaintiff's further assertion that Alleghany "sold out" the other Class B stockholders by entering into the settlement agreement. As the Commission noted in its report: "Alleghany as the majority owner of the Class B stock has spent considerable sums of money over the years to protect its interest. It is the party to the agreement that has the most to gain and the most to lose. Under the circumstances, there is little or no likelihood that Alleghany would agree to surrendering its stock for less than fair value. Besides all the evidence of record contraindicates that Alleghany agreed to accept less than fair value."

Our sole function in this proceeding is to determine whether the orders of the Commission are supported by substantial evidence on the whole record and do not involve an error of law. *Norfolk & Western Railway Co.* v. *United States,* D. C. Mo., 316 F.Supp. 1396, 1399. In our judgment, the Commission applied correct legal standards in its consideration of the application and its ruling thereon. The evidence before the Commission, which is summarized in its report and which need not be here repeated, amply supports the order granting MoPac's application. Accordingly, judgment will be entered affirming the orders of the Commission and dismissing the complaint.

Dated this 14th day of November, 1974.

/s/ WILLIAM H. WEBSTER
Judge, U. S. Circuit Court

/s/ JOHN K. REGAN
Judge, U. S. District Court

/s/ H. KENNETH WANGELIN
Judge, U. S. District Court

A True Copy of the Original

Filed Nov. 14, 1974
Attest: WILLIAM D. RUND, *Clerk*

By: MURLEM A. SHAYER
Deputy Clerk

Dated: Nov. 18, 1974
St. Louis, Missouri